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FEDERAL COMMUNICATIONS COMMISSION
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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of Ameritech Corp., Transferor,	)	CC Docket No. 98-141
And SBC Communications, Transferee, For	)	
Consent to Transfer Control of Corporations	)	ASD File No. 99-49
Holding Commission Licenses and Lines	)	

PETITION FOR RECONSIDERATION OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel") respectfully seeks Commission reconsideration and/or clarification regarding important portions of the Commission's recent decision granting SBC's request for a modification of its merger conditions in the above-referenced proceeding.[1] CompTel asserts that this Petition is timely and filed in conformity with Section 1.429 of the Commission's Rules.

Summary

CompTel respectfully requests that the Commission clarify and explain the legal and operational relationship between SBC's ILECs and their advanced services affiliate by specifically determining that SBC's affiliate should purchase access to SBC's Pronto network through network element combinations, and not some unregulated, untariffed "Broadband Service." CompTel also requests a clarification that SBC's ILECs must facilitate "line splitting" for any CLEC who purchases the loop, regardless of whether the

[1] Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket No. 98-141, *Second Memorandum Opinion and Order*, rel. Sept. 8, 2000 ("*Pronto Modification Order*").

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loop is terminated at a CLEC collocation arrangement, or the ILEC's unbundled switching UNE. CompTel further asks the Commission to reconsider CompTel's assertion that, by proceeding with planning activities for Project Pronto during the "transition period", SBC committed a *per se* violation of its merger conditions, which require the affiliate, not the ILECs, to undertake any network planning with respect to how advanced services will be provided to new customers. Finally, CompTel requests that the Commission reconsider its decision regarding the ability of integrated voice and data providers to receive nondiscriminatory access to the ordered conditions, and to impose a 90 day mandatory transition period, during which SBC must demonstrate compliance with the Commission's conditions prior to being able to benefit from the *Modification.*

I. The Commission Should Determine that SBC's Affiliate Will Be Purchasing ILEC-Combined UNE Combinations

In the *Pronto Modification Order*, the FCC states that "it takes no position on whether SBC's broadband offering is subject to Sections 251 and 252."[2] The Commission claims that it "need not" decide this issue because SBC "has committed to providing all carriers nondiscriminatory access to its Broadband Offering and to making available all technically feasible features, functions, and capabilities."[3] Thus, the Commission seems to reason that, because SBC is essentially providing the functional equivalent of unbundled network elements ("UNEs") and UNE combinations as well as UNE pricing on a "voluntary" basis, there is no reason to explicitly determine that SBC's

[2] *Pronto Modification Order*, ¶ 30.
[3] Id., ¶ 20.

ILECs will be providing voluntarily-combined UNEs for their affiliate and others.[4]

Because of CompTel's well-founded concerns that future disputes are likely to arise regarding the obligations of SBC's ILECs, CompTel previously sought, and again requests, that the Commission clarify that the SBC affiliate (and thus unaffiliated carriers seeking to avail themselves of the "Broadband Offering") is actually purchasing (and SBC's ILECs are providing) voluntarily-combined UNEs.

Such a clarification would benefit states, competitors, and SBC's ILECs by enabling them to quickly ascertain and resolve disputes regarding SBC's ongoing obligations under Sections 251 and 272 of the Act, pursuant to the unmodified merger conditions. A clarification by the Commission would provide all interested parties certitude in defining and identifying SBC's "bedrock" legal obligations. Furthermore, a

[4] That the FCC clearly views the SBC offering as UNEs is clear from the almost exclusively "UNE" language that the Commission uses in describing the offering: "SBC commits to making available all features, functions, and capabilities of the equipment installed in remote terminals at just, reasonable, and nondiscriminatory rates, terms and conditions." (¶ 42) SBC's offering also is described as ". . . a combination of network elements" (¶ 30). Moreover, "[c]arriers will order these two additional elements as a single combination by . . . the process already used to order UNEs" (¶ 31). CLECs will "submit ASRs and LSRs to order the combination of network elements comprising the Broadband Offering" (¶ 32), also (¶ 47). SBC will provide "the full features, functions, and capabilities of the equipment" (¶ 23) *compare* "[network element] also includes features, functions, and capabilities that are provided by means of such facility or equipment. . . ." 47 U.S.C. § 3(29). Similarly, the Commission's justification for requiring the conditions, attendant to its modification ("to ensure that competitors have the ability to compete effectively in the advanced services marketplace"(¶ 1)) is constructively indistinguishable from a finding that, without the broadband "offering," competitors would be impaired in their ability to provide advanced services. See analogous explanations for specific conditions: "SBC's collocation commitments help ensure that competitive carriers will have access to the remote terminals—a critical point in the network." (¶ 35); and, finally, "access to copper is critical to facilities-based competitive LECs...." (¶ 38).

Commission clarification on this point would be the most prudent and responsible course of action, given the likelihood that the near term state regulatory environment is quite likely to be characterized by numerous contentious disputes over SBC's legal obligations with respect to the Pronto architecture.

Finally, a conclusive Commission determination that SBC is providing network elements to its affiliate would benefit all parties by putting the "meat" of other Commission orders on the "bones" of the bare conditions. In other words, such a determination by the Commission would provide helpful and necessary detail to the obligations imposed in the Conditions to the *Pronto Modification Order*, through the implicit incorporation of all Commission precedent dealing with obligations of nondiscrimination and definitions of network elements.

II. The FCC Should Clarify That SBC Must Allow Requesting Carriers Purchasing the Unbundled Loop Element, Provided Through the Pronto Network, Unrestricted and Nondiscriminatory Use of That Loop

During the proceeding to consider SBC's request for a modification of its merger conditions, AT&T and CompTel submitted comments in response to SBC's proposed "Voluntary Commitments." These commitments, as revised on August 2, 2000, were ultimately adopted by the Commission, *in toto*, as the Conditions to the FCC's grant of the requested modification. Both AT&T and CompTel asked the FCC to modify SBC's proposed conditions to make clear that competitors purchasing the unbundled loop network element, either separately or as part of the UNE "platform,"[5] would have the same ability to access the SBC Broadband Offering as any other competitive carrier.[6]

In the *Pronto Modification Order*, the FCC declined to require such a modification, stating that it was "considering AT&T's arguments relating to the use of UNE-P to provide DSL service and line splitting in the *Local Competition* and *Line Sharing* Proceedings. . . ."[7] While the Commission's assertion is partially correct (the FCC is considering some issues relating to line splitting in those other proceedings), the precise issue raised in this proceeding—whether a UNE-P based carrier has the same nondiscriminatory access to the loop as SBC's ILECs, or their advanced services affiliate—has already been addressed by the Commission in its order granting SBC's Section 271 application for Texas.[8]

a. The FCC Must Clarify That The Commission's Pre-Existing Line Splitting Policy Was Not Abridged By The *Pronto Modification Order*

In the *Texas 271 Order*, the FCC, in responding to similar complaints by AT&T and IP Communications (*i.e.*, that SBC prevented UNE-P based voice providers from providing xDSL services in conjunction with UNE-P voice service), clearly states that "incumbent LECs have an obligation to permit competing carriers to engage in line splitting over the UNE-P where the competing carrier purchases the entire loop and

[5] The unbundled network element platform, or UNE-P, is the combination of all the elements necessary to provide an end-user with the same local exchange service that is provided by the ILEC. This UNE combination is comprised of the loop, local circuit switching, and common transport network elements.
[6] CompTel August 8 *ex parte*, at 7. *See also*, AT&T August 23 *ex parte*, at 4.
[7] *Pronto Modification Order*, ¶ 51.
[8] Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas, *Memorandum Opinion and Order*, CC Docket No. 00-65, rel. June 30, 2000 ("*Texas 271 Order*"), ¶¶ 323-327.

provides its own splitter."[9] The Commission went on to find that SBC does allow competitive carriers to "provide both voice and data services over the UNE-P."[10] While the Commission, in the *Texas 271 Order*, did note that there were some unresolved issues that would be addressed in reconsideration proceedings,[11] those issues were not relevant to the positions of CompTel, or AT&T, in this proceeding. Thus, CompTel asks the FCC to reconsider its decision, in order to bring the Conditions to the *Pronto Modification Order* into harmony with the Commission's previous ruling on the same issue.

b. The Commission Must Clarify That Line Splitting Obligations Created By Unmodified Merger Conditions Are Not Modified By The *Pronto Modification Order*

In the present case, there are two unmodified merger conditions that also require the FCC to determine that SBC must allow a UNE-P provider the ability to share the loop with another DSL provider. First, SBC's ILECs, because of their nondiscrimination obligations, must allow competitive carriers to use the network in the same basic manner that the SBC ILECs are using it. Because the SBC advanced services affiliate is a separate entity, SBC's ILECs will constructively be doing that which they seek to prevent other carriers from doing—that is, providing advanced services in conjunction with voice service, by means of a DSL vendor that provides service through the SBC wholesale

[9] *Texas 271 Order*, ¶ 325. See also, *Id.*, n. 902, stating that the ILEC could also voluntarily provide the splitter in this situation, although the ILEC is not currently required to provide the splitter functionality under the Commission's existing rules.
[10] *Id.*, n. 903, *citing* a June 6 SBC *ex parte* Letter.
[11] *Id.*, ¶ 328.

Broadband Offering. Consequently, through the application of Section 272(e)(2),[12] SBC must provide the same ability to purchase "exchange access" (of which DSL service is a form) to other voice providers, regardless of whether they are collocated or are using the UNE-P.

The reasoned application of an additional unmodified merger condition—that the merged entity must abide by the terms of the Commission's *Collocation Order*—further argues for clarification and/or reconsideration.[13] There is no provision in the merger conditions for SBC to escape compliance with any of the terms of the *Collocation Order* should portions of that order be vacated on appeal. Thus, the requirement that ILECs permit and facilitate CLEC-to-CLEC interconnection in the ILEC central office ("CO") is still binding on SBC. Therefore, SBC cannot prohibit competitive carriers from interconnecting in the CO, regardless of whether one of the CLECs is using the wholesale Broadband Offering and the other CLEC is using either the UNE loop, or the UNE-P.

For the foregoing reasons, expeditious reconsideration is necessary to clarify that the *Pronto Modification Order* does not modify line splitting obligations consistent with pre-existing Commission policy and the pre-existing unmodified merger conditions.

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[12] Sections 272(b), (c), (e), and (g) apply to SBC's advanced services affiliate through ¶ 3 of the original SBC/Ameritech merger conditions. Section 272(e)(2) requires that SBC's ILECs must make any "facilities, services, or information concerning its provision of exchange access" to its affiliate available to other carriers on the same terms and conditions. Note that the Commission has characterized DSL service, when it is used to connect ISP customers to the Internet, as "exchange access." *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Remand (rel. Dec. 23, 1999) ¶ 33.

[13] *See, In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, First Report and Order*, CC Docket No. 98-147, FCC No. 99-48 (rel. March 31, 1999). *See also*, Merger Conditions, ¶ 37.

III. The FCC Should Determine that SBC Committed A *Per Se* Violation of the Merger Conditions By Exceeding the Scope and Purpose of the Limited Transition-Specific Exception to the Network Planning Requirements of the Conditions

Throughout this proceeding, CompTel has consistently and repeatedly argued that SBC's ILECs had encroached on a function that was the sole responsibility of the advanced services affiliate by undertaking such a massive network reconfiguration for the primary purpose of expanding the number of *new customers* who have access to SBC's advanced services.[14] CompTel urged the Commission to reject the notion that the limited transitional exceptions to the general network planning requirements provided SBC's ILECs an authority to perform wide scale network planning for the affiliate that was limited only by the express time period of the exception. Rather, CompTel frequently explained, the limited exception to the requirements of the conditions must be interpreted as also being constrained by its *purpose*—which was expressly and specifically limited to the network planning necessary to "minimize any disruption to the efficient and timely delivery of Advanced Services to customers. . . to permit an orderly transition to the steady-state provisioning of Advanced Services. . . ."[15]

It would be at odds with the purpose and the plain language of the merger conditions to suggest, as SBC has, that the rights granted SBC's ILECs to engage in network planning activities for its affiliate during the transition period were intended to be "absolute" or "unequivocal."[16] Such an unconstrained interpretation could easily lead to the perverse result that SBC could engage in planning on a level so massive, and so

[14] See CompTel April 26 *ex parte* Letter at 2; CompTel May 19 *ex parte* Letter at 2; CompTel August 8 *ex parte* Letter at 4.
[15] Merger Conditions, ¶ 4.n.
[16] Letter from Michael K. Kellogg to Carol E. Mattey, February 15, 2000, filed in CC Docket No. 00-4, at 3-5.

comprehensive, that there would be no need for the affiliate to ever be effected by the requirements of the merger conditions during the steady-state period. Yet such a non-sensical interpretation—that the Commission somehow only meant to impose these separate obligations on the advanced services affiliate if SBC failed to cleverly take advantage of this "loophole"—is precisely the construction that SBC urges on the Commission, and that CompTel rejects.

CompTel has explained that, because Project Pronto was designed to address those customers who could not get access to SBC's advanced services at the time of the merger, then any network planning functions performed by SBC's ILECs for the affiliate relating to Project Pronto would constitute a *per se* violation of the merger conditions. However, in the *Pronto Modification Order*, the FCC rejected CompTel's interpretation, noting that, although the functions CompTel complains SBC's ILECs performed relating to Project Pronto were "network planning" functions, SBC's ILECs were allowed to do these activities for the affiliate. The Commission also noted that SBC had begun work on Project Pronto prior to the imposition of the conditions. The Commission, by criticizing CompTel for not providing evidence that SBC's ILECs improperly engaged in network planning for their affiliate *after* the expiration of the transition period, seems to accept SBC's interpretation of the unconstrained scope of its authority during the transition period.

As CompTel has previously explained, this interpretation would substantially weaken SBC's obligations under the merger conditions. Since CompTel believes that this interpretation may not have been intended, CompTel requests that the Commission reconsider its rejection of CompTel's assertion that SBC, in acting to implement Project

Pronto without the Commission's Modification of the merger conditions, committed a *per se* violation of the network planning requirements of the merger conditions.

IV. The FCC Should Require a New Transition Period During Which SBC Would Demonstrate Compliance With the New Conditions Prior to Being Allowed to Benefit From the Modification

CompTel has also advocated throughout the Commission's consideration of SBC's modification request that, to the degree that new pre-order, order, and provisioning processes and systems are required for CLECs to access the new Pronto architecture/network configuration (and, thus, for SBC to receive its requested modification), then CLECs must not be disadvantaged relative to SBC's ILECs or affiliate. One way to ensure nondiscriminatory access, CompTel has suggested, would have been for CLECs and SBC's advanced services affiliate to "take delivery" of the Pronto network at the same time.[17] Moreover, by "take delivery," CompTel intended not simply that the Broadband Offering would nominally become "available" to all parties at the same time, but rather, that all carriers could meaningfully take advantage of the offering at the same time. In other words, should SBC develop special business rules, ordering/provisioning procedures, services (like the "integrated voice and data" service), or other capabilities (ability to provide splitterless DSL) for CLECs to have parity access to their intended customers, then SBC must demonstrate that it has implemented these conditions before its affiliate could begin to offer service through the Pronto network. Said differently, until unaffiliated CLECs receive the cooperation they require from SBC's ILECs in order to have the same access to the Pronto network, SBC's affiliate should not be able to benefit from the work performed by SBC's ILECs.

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[17] CompTel May 18 *ex parte* at 4 (proposing new "transition" period as part of required implementation of proposed conditions); CompTel August 8 *ex parte* at 6-7.

The Commission, however, in rejecting CompTel's suggestion, concluded that a "mandatory transition period is not necessary in light of SBC's commitment to make available the Broadband Offering to all carriers (including its Advanced Services Affiliate) at the same time."[18] CompTel nonetheless wishes to point out that the Broadband Offering is only one of several conditions that the Commission concluded were necessary "to ensure that competitors have the ability to compete effectively in the advanced services marketplace."[19]

Contrary to the Commission's cited justification in rejecting CompTel's proposed transition period, there are several absolutely essential conditions, such as the integrated voice/data service, which will not be available to competitive carriers at the same time as SBC's affiliate. In fact, SBC has committed to provide the integrated voice/data service within 90 days of the Commission's order granting their modification. This is a fact which, using the Commission's own reasoning, would seem to justify the *adoption*, and not the rejection, of CompTel's proposed 90 day mandatory transition period. Thus, in order to bring the implementation and effect of the conditions into harmony with their stated purpose, CompTel requests that the Commission reconsider its decision and suspend the effective date of its Order pending a demonstration by SBC of compliance with the ordered conditions within a 90 day period.

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[18] *Pronto Modification Order*, ¶ 50.
[19] *Id.*, ¶ 1.

V. Conclusion

For the reasons discussed above the Commission should act promptly to clarify and reconsider the portions of the Second Memorandum Opinion and Order that are inconsistent with the purpose of the SBC/Ameritech merger conditions and other unmodified conditions, as well as pre-existing Commission policy.

Respectfully submitted,

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